No. 18-315

IN THE

Supreme Court of the United States

COCHISE CONSULTANCY, INC. AND
THE PARSONS CORPORATION,
Petitioners,

v.

UNITED STATES OF AMERICA *EX REL.* BILLY JOE HUNT,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE NATIONAL DEFENSE INDUSTRIAL ASSOCIATION AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

The Chamber of Commerce of the United States of America (Chamber) is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus curiae briefs in cases that raise issues of concern to the nation's business community.

The Pharmaceutical Research and Manufacturers of America (PhRMA) is a voluntary, nonprofit association representing the Nation's leading research-based biopharmaceutical companies. PhRMA's members research and develop innovative medicines, treatments, and vaccines that save, prolong, and improve the quality of lives of countless individuals around the world every day.

The National Association of Manufacturers (NAM) is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector,

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[1] The parties have consented to the filing of this brief, and copies of letters granting consent have been filed with the Clerk. No counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The National Defense Industrial Association (NDIA) is a non-partisan and non-profit organization comprised of more than 1,650 corporations and 75,000 individuals spanning the entire spectrum of the defense industry. NDIA's corporate members include not only some of the nation's largest military equipment contractors, but also companies that provide the U.S. military and other federal departments and agencies with a multitude of professional, logistical, and technological services, both domestically and in overseas combat zones and other dangerous locations. Individuals who are members of NDIA come from the Federal Government, the military services, small businesses, corporations, prime contractors, academia, and the international community.

This case presents a critical question affecting *amici* and their members, who are often sued under the False Claims Act's *qui tam* provisions: whether a relator in a *qui tam* False Claims Act suit may lengthen the limitations period by invoking 31 U.S.C. § 3731(b)(2)—which runs from the date when "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances"—even though the United States has declined to intervene. The Eleventh Circuit's decision imposes significant burdens on *amici*'s members by allowing relators to bring very stale suits, based on events up to a decade

old, even when they knew of the alleged violation many years earlier.

SUMMARY OF ARGUMENT

Departing from all other courts of appeals that have decided the issue, the Eleventh Circuit charted a new course in interpreting 31 U.S.C. § 3731(b)(2)—one that is inconsistent with this Court's decision in *Graham County Soil & Water Conservation District* v. *United States ex rel. Wilson*, 545 U.S. 409 (2005), ignores both statutory text and purpose, and imposes significant burdens on False Claims Act defendants. This Court should reverse.

The Eleventh Circuit concluded that a *qui tam* relator may lengthen the limitations period to ten years because, in its view, the phrase "civil action under section 3730" in subsection 3731(b) is all-inclusive, encompassing a relator's suit in which the government has declined to intervene. As this Court has previously held, however, Congress used that phrase "imprecisely." *Graham Cty.*, 545 U.S. at 418. The same kinds of statutory context that led this Court in *Graham County* to read subsection 3731(b)(1) as excluding retaliation actions should lead the Court to conclude that subsection 3731(b)(2) does not apply to *qui tam* actions in which the government has declined to intervene.

Subsection 3731(b) provides:

> A civil action under section 3730 may not be brought—
>
> > (1) more than 6 years after the date on which the violation of section 3729 is committed, or

> (2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed,
>
> whichever occurs last.

31 U.S.C. § 3731(b).

Subsection 3731(b)(2) confines its reach to actions involving "the official of the United States charged with responsibility to act." 31 U.S.C. § 3731(b)(2). A government official is "charged with responsibility to act" only in cases in which the government is a party. *Id.* Thus, reading subsection 3731(b)(2) as covering cases in which the government has chosen not to become a party would create just the sort of "textual anomaly" this Court found unacceptable in *Graham County*. 545 U.S. at 416.

Interpreting subsection 3731(b)(2) as applying in cases the government has declined to join would lead to other "counterintuitive results" as well. *Graham Cty.*, 545 U.S. at 421. First, subsection 3731(b)(1) would be rendered largely superfluous. If subsection 3731(b)(2) applied in declined cases, then subsection 3731(b)(1) would define a relator's limitations period only in the rare circumstances when the government learns of the alleged violation within three years of when it happened. Second, the running of a relator's limitations period would be triggered by the government's knowledge of material facts even though the government is not a party to the case. This would give relators a financial incentive to wait before reporting fraud

to the government (or bringing an action) because the longer the fraud persists, the greater the potential recovery would be. It would thus frustrate one of the False Claims Act's core purposes: to combat fraud against the government by encouraging those with insider knowledge to come forward promptly.

The practical consequences of allowing relators to lengthen the limitations period also counsel against allowing relators to rely on subsection 3731(b)(2) when the government has declined to intervene. Every year, *qui tam* relators file hundreds of False Claims Act complaints, the vast majority of which are litigated by relators only, without the government's intervention. *See* DOJ, *Fraud Statistics—Overview: October 1, 1986 – September 30, 2018*, at 1, https://www.justice.gov/civil/page/file/1080696/download (visited Jan. 9, 2019); Pet. App. 9a n.4. This Court's approval of the Eleventh Circuit's decision would not only encourage more *qui tam* suits overall, but would encourage exactly the wrong kind of False Claims Act suits—stale claims up to a decade old which the government has decided are not worthwhile to pursue and which frequently turn out to be meritless.

Companies doing business with the government suffer as a result. Ten years is a very long time when it comes to loss of evidence. Without a robust statute of limitations that screens out stale claims, False Claims Act defendants would have to expend significant costs to defend against allegations for which memories have faded and witnesses are less reliable. Those costs, coupled with the threat of cumbersome discovery and treble damages, may lead defendants to settle non-intervened claims, irrespective of their merits. Government contractors will also incur reputational damage simply from being sued. That damage has lasting

impact, particularly for smaller and relatively new businesses.

For all of these reasons, the Court should hold that subsection 3731(b)(2) is not available in *qui tam* cases in which the government has declined to intervene.

ARGUMENT

I. SUBSECTION 3731(b)(2) APPLIES ONLY TO CASES IN WHICH THE UNITED STATES IS A PARTY

The Eleventh Circuit held that a relator may lengthen the limitations period up to ten years under subsection 3731(b)(2) because subsection 3731(b) applies to "[a] civil action under section 3730" and a non-intervened *qui tam* suit qualifies as such a civil action. Pet. App. 14a. But, as this Court emphasized in addressing subsection 3731(b) before, "[s]tatutory language has meaning only in context." *Graham Cty. Soil & Water Conservation Dist.* v. *United States ex rel. Wilson*, 545 U.S. 409, 415 (2005). And the context supplied by subsection 3731(b)(2) to subsection 3731(b)'s reference to "a civil action under section 3730" makes clear that it "refer[s] only to a subset of § 3730 actions." *Id.* at 417-418. Indeed, the fundamental flaw of the Eleventh Circuit's decision is that it distinguished *Graham County* in the broadest brushstroke possible—that it did not "directly address[]" whether subsection 3731(b)(2) applies to a non-intervened *qui tam* action, Pet. App. 17a—while ignoring the Court's reasoning that compelled a narrower reading of a "civil action under section 3730."

In *Graham County*, the Court held that the six-year statute of limitations in subsection 3731(b)(1) does not apply to retaliation claims, even though the whole of subsection 3731(b) applies to a "civil action under

section 3730" and retaliation claims are authorized by subsection 3730(h). 545 U.S. at 415-422. The Court reached this conclusion for two reasons. First, the statutory context indicated that Congress used the phrase "[a] civil action under section 3730" "imprecisely," and reading that prefatory phrase broadly would create a "textual anomaly" in which the phrase's application to a retaliation claim would "sit[] uneasily with § 3731(b)(1)'s language." *Id.* at 415-416, 418. Specifically, the Court noted, subsection 3731(b)(1) identified a "violation of section 3729" as the triggering event from which § 3731(b)(1)'s limitations period would run, but a plaintiff bringing a retaliation claim would not need to allege any such violation. *Id.* at 416. Second, the Court found that this and other "counterintuitive results" warranted a narrower reading of "civil action under section 3730." *Id.* at 420-421. Both of those reasons for reading "[a] civil action under section 3730" as referring "only to a subset of § 3730 actions" apply with the same force to subsection 3731(b)(2) as to 3731(b)(1).

A. Statutory Context Makes Clear That *Qui Tam* Relators May Not Invoke The Longer Limitations Period In Subsection 3731(b)(2) When The Government Declines To Intervene

Much as in *Graham County*, the particular subsection at issue here—subsection 3731(b)(2)—contains limiting language, providing for a limitations period triggered by the knowledge of "the official of the United States charged with responsibility to act." 31 U.S.C. § 3731(b)(2). The Eleventh Circuit understood this phrase to refer to a government official. Pet. App. 29a-31a; *see also United States ex rel. Sanders* v. *North Am. Bus Indus., Inc.*, 546 F.3d 288, 293-294 (4th Cir. 2008); *United States ex rel. Sikkenga* v. *Regence Blue-*

cross Blueshield of Utah, 472 F.3d 702, 726 (10th Cir. 2006). Thus, Congress clearly intended the longer limitations period in subsection 3731(b)(2) to apply to those False Claims Act actions in which the government has chosen to participate—the only kind of suit in which the government is "charged with responsibility to act." 31 U.S.C. § 3731(b)(2); *cf. Charge*, Oxford English Dictionary 13.c ("to take upon oneself the charge or responsibility of"), http://www.oed.com/view/Entry/30688?rskey=kSkNkL&result=3#eid; *Responsibility*, Oxford English Dictionary 2.b ("[t]he state or fact of being in charge of or of having a duty towards a person or thing; obligation"), http://www.oed.com/view/Entry/163862?redirectedFrom=responsibility#eid; *Responsibility*, Black's Law Dictionary 1506 (10th ed. 2014) ("[t]he quality, state, or condition of being answerable or accountable").

Interpreting subsection 3731(b)(2) as applying in non-intervened cases would thus create just the sort of "textual anomaly" that this Court denounced in *Graham County*. 545 U.S. at 416. Setting aside the fact that a government official would not be "charged with" any "responsibility" in a non-intervened case, there would also be nothing to "act" on in such circumstances. 31 U.S.C. § 3731(b)(2). As the Fourth Circuit noted, "it is doubtful that the government official 'charged with responsibility to act in the circumstances' could be charged with any responsibility other than to see that the government brings or joins an FCA action within the limitations period." *Sanders*, 546 F.3d at 294. By contrast, it would be bizarre to say a government official is "'charged with responsibility' to ensure that *a relator* brings a timely FCA action." *Id.* (emphasis added).

Limiting subsection 3731(b)(2) to intervened actions also makes sense because "'the specific governs

the general'" in statutory construction. *RadLAX Gateway Hotel, LLC* v. *Amalgamated Bank*, 566 U.S. 639, 645 (2012). As this Court noted, that canon has "full application" where, as here, "a general authorization and a more limited, specific authorization exist side-by-side." *Id.* Accordingly, the specific authorization in subsection 3731(b)(2)—that it apply only to suits in which a government official would have "responsibility to act," 31 U.S.C. § 3731(b)(2)—supersedes the general authorization in the prefatory phrase "[a] civil action under section 3730," *id.* § 3731(b). In other words, whatever the scope of a "civil action under section 3730," it should "'not be held to apply to a matter specifically dealt with'" in subsection 3731(b)(2). *RadLAX Gateway Hotel*, 566 U.S. at 646-647 (quoting *D. Ginsberg & Sons, Inc.* v. *Popkin*, 285 U.S. 204, 208 (1932)).

The Eleventh Circuit barely addressed this textual evidence, merely stating that "nothing in § 3731(b)(2) says that its limitations period is unavailable to relators" in non-intervened suits. Pet. App. 14a. The court thus offered no basis to dispel the "textual anomaly" its interpretation creates. *Graham Cty.*, 545 U.S. at 416.

The contemporaneous understanding of the 1986 amendments to the False Claims Act confirms that Congress did not intend subsection 3731(b)(2) to apply to *qui tam* cases the government does not join. Subsection 3731(b)(2) was added in 1986 as a limited tolling period for the government. Before 1986, the False Claims Act's limitations provision simply stated that "[a] civil action under section 3730 of this title must be brought within 6 years from the date the violation is committed." 31 U.S.C. § 3731(b) (1982); *see* Pub. L. No. 97-258, 96 Stat. 877, 979 (1982). Experience demonstrated that "requests to sue" may "come in right on the brink of the statute of limitations, and sometimes

beyond," which might preclude the government from acting on fraud that "ha[d] been concealed, as it frequently is, from the Government." *False Claims Act Amendments: Hearings Before the Subcomm. on Admin. Law & Gov't Relations of the H. Comm. on the Judiciary*, 99th Cong. 159 (1986) ("*House Hearings*") (statement of Assistant Attorney General Willard). The additional limitations period in subsection 3731(b)(2) was designed to give the government "a little more flexibility" in bringing those actions, *id.*, based on when the relevant information has reached "an official in a position both to recognize the existence of a possible violation of [the False Claims Act] and to take steps to address it," 132 Cong. Rec. 20,530, 20,536 (1986) (statement of Senator Grassley, lead sponsor of the 1986 amendments).

The model upon which subsection 3731(b)(2) was based further indicates that the longer limitations period applies only in cases in which the government intervenes. Subsection 3731(b)(2) was "adopted directly from" the general tolling provision in 28 U.S.C. § 2416(c). 132 Cong. Rec. at 20,536 (statement of Senator Grassley); *compare* 31 U.S.C. § 3731(b)(2) (action must be brought within three years of when "facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances") *with* 28 U.S.C. § 2416(c) (general statute of limitations excludes periods during which "facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances").

Subsection 2416(c) permits tolling *only* in actions brought by the government. *See, e.g.*, 28 U.S.C. § 2416

("Time for commencing actions brought by the United States—Exclusions"). It is true, as the Eleventh Circuit noted, that section 2415 says the limitations period in section 2416 applies only to claims "brought by the United States or an officer or agency thereof." *Id.* § 2415(a), (b); *see* Pet. App. 27a-28a. But the Eleventh Circuit overlooked that similarly limiting language exists in subsection 3731(b)(2)—"the official of the United States charged with responsibility to act." 31 U.S.C. § 3731(b)(2); *see supra* pp. 7-9. That language confines the reach of subsection 3731(b)(2) much as the similar language in section 2415 confirms the limited reach of section 2416.

B. Allowing Relators To Invoke Subsection 3731(b)(2) Creates Counterintuitive Results

A contrary reading would lead to numerous "counterintuitive results." *Graham Cty.*, 545 U.S. at 421.

First, subsection 3731(b)(1) would be rendered largely superfluous. This Court has noted "time and again" that courts are "'obliged to give effect, if possible, to every word Congress used,'" *National Ass'n of Mfrs.* v. *Department of Defense*, 138 S. Ct. 617, 632 (2018), and not render a clause, sentence, or word "'superfluous, void, or insignificant,'" *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001). Yet, the Eleventh Circuit's interpretation does precisely that. Allowing relators to rely on subsection 3731(b)(2) would give relators a financial incentive to delay bringing an action because the longer the fraud persists, the greater the potential recovery would be. The only scenario in which the six-year limitations period in subsection 3731(b)(1) would "expire later" (Pet. App. 24a) than the limitations period in subsection 3731(b)(2) is if the government were to learn of the alleged violation within three years of

when it occurred. If the government were to learn of the alleged violation three years or more after it occurred, subsection 3731(b)(1) would have no effect. *See Sikkenga*, 472 F.3d at 726 ("If relators could avail themselves of the tolling provisions of § 3731(b)(2), then we are hard pressed to describe a circumstance where the six-year statute of limitations in § 3731(b)(1) would be applicable.").

The Eleventh Circuit dismissed these concerns because, in its view, other provisions of the False Claims Act—such as the first-to-file bar, *see* 31 U.S.C. § 3730(b)(5), or the public disclosure bar, *id.* § 3730(e)(4)—may provide an incentive for relators to promptly report a violation to the government. Pet. App. 23a-24a. But when Congress added subsection 3731(b)(2) in 1986, the False Claims Act already barred a relator's action that is "based on evidence or information the Government had when the action was brought." Pub. L. No. 97-258, 96 Stat. 877, 979. Still, Congress deemed the additional tolling period in subsection 3731(b)(2) necessary because fraud was "frequently" concealed from the government until the then-existing six-year statute of limitations period ran out. *House Hearings* 159 (statement of Assistant Attorney General Willard). And here, the incentives that the Eleventh Circuit referenced seemingly had little effect because the relator waited seven years after he learned of the alleged violation to file suit. *See* Pet. App. 3a-5a.

Moreover, whatever incentive the public-disclosure and first-to-file bars may offer, relators have "a strong financial incentive" to wait and "allow false claims to build up" because doing so would "increas[e] their own potential recovery." *Sanders*, 546 F.3d at 295. That incentive means that if relators can take advantage of subsection 3731(b)(2) in declined cases, subsection

3731(b)(1) will inevitably become "insignificant, if not wholly superfluous." *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001); *see also New Process Steel, L.P.* v. *NLRB*, 560 U.S. 674, 681 (2010) (rejecting reading that "dramatically undercuts the significance" of another statutory provision).

Second, under the Eleventh Circuit's reading, a relator's limitations period would be triggered by the knowledge of a government official, a non-party to the case. Not only does that encourage a wait-and-see approach by relators, but it also makes "no sense whatsoever" because "[t]he government's knowledge of 'facts material to the right of action' does not notify the relator of anything," meaning, "that knowledge cannot reasonably begin the limitations period for a relator's claims." *Sanders*, 546 F.3d at 294; *see also* Pet. Br. 23-25.

Third, all of these reasons highlight the fundamental conflict between the Eleventh Circuit's interpretation and the False Claims Act's *qui tam* provisions. The *qui tam* provisions are intended to "combat fraud quickly and efficiently by encouraging relators to bring actions that the government cannot and will not"—in other words, "'to stimulate actions by private parties should the prosecuting officers be tardy in bringing the suits.'" *Sanders*, 546 F.3d at 295 (quoting *United States ex rel. Marcus* v. *Hess*, 317 U.S. 537, 547 (1943), *superseded by statute as stated in Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 412 (2011)). Even the Eleventh Circuit acknowledged prompt combating of fraud as one of the False Claims Act's central purposes. Pet. App. 23a-24a. Yet, the court of appeals made subsection 3731(b) an outlier divorced from "'the purpose and context of the statute,'" *Kasten* v. *Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 7

(2011), by allowing (and thus encouraging) relators to wait the full ten years allowed. *See Sanders*, 546 F.3d at 295; *Sikkenga*, 472 F.3d at 725-726; *United States ex rel. Hyatt* v. *Northrop Corp.*, 91 F.3d 1211, 1218 (9th Cir. 1996) (allowing *qui tam* relators to "wait a full ten years after learning of the deceit before suing" would "frustrate the purposes of a limitation period and the purposes of the [False Claims] Act").

Respondent makes much of the fact that Congress intended *qui tam* relators to be able to bring a False Claims Act suits even when the government has declined to intervene. Resp. to Pet. 15-17; *see also* Pet. App. 25a. But no one disputes that. The question here is whether relators may *wait* to bring an action under subsection 3731(b)(2), when Congress intended relators to promptly file the suit, added subsection 3731(b)(2) specifically to benefit the government, and provided that the additional limitations period be available only when a government official "charged with responsibility to act" is involved. Under the logic of *Graham County*, the answer is clearly "No."

II. Applying Subsection 3731(b)(2) In Relator-Only Cases Imposes Significant Burdens On False Claims Act Defendants

The practical consequences of the Eleventh Circuit's decision further counsel against affirming the judgment below.

A. This Court has repeatedly emphasized that statutes of limitations "embody a 'policy of repose, designed to protect defendants'" by fostering "'elimination of stale claims.'" *Lozano* v. *Montoya Alvarez*, 572 U.S. 1, 14 (2014); *see also John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 133 (2008) ("Most statutes

of limitations seek primarily to protect defendants against stale or unduly delayed claims."). They provide, in other words, the "'security and stability to human affairs'" that are "'vital to the welfare of society.'" *Gabelli* v. *SEC*, 568 U.S. 442, 448-449 (2013). And they "'promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.'" *Id.* at 448.

Companies that conduct business with the government are entitled to the security and stability that reasonable limitations periods provide. They should not have to face stale claims and suffer the reputational injury of being accused of fraud while being hindered in defending themselves by the loss of evidence inevitably caused by long delays.

Congress made the judgment that an additional limitations period is appropriate when the government learns of a violation late but determines that the alleged fraud is worth pursuing. But it did not intend relators to drag their feet for up to a decade. On the contrary, the incentives Congress established in the False Claims Act's *qui tam* provisions are intended to encourage the prompt filing of claims. *See supra* pp. 13-14.

B. Extending subsection 3731(b)(2) to non-intervened suits is particularly costly for False Claims Act defendants because of their duration and the discovery burdens they impose. Every year, *qui tam* relators file hundreds of suits. *See* DOJ, *Fraud Statistics—Overview: October 1, 1986 – September 30, 2018*, at 1 ("2018 Fraud Statistics"), https://www.justice.gov/civil/page/file/1080696/download (visited Jan. 9, 2019). In fiscal year 2018 alone, relators filed 645 new False Claims Act actions, and the number of new *qui tam*

complaints per year has remained above 600 every year since 2011. *Id.* The United States typically intervenes in only about a quarter of *qui tam* cases, leaving the vast majority to be litigated by relators on their own. *See* Pet. App. 9a n.4.

The sheer volume of non-intervened *qui tam* suits exacerbates the burdens of defending against those claims. False Claims Act litigation touches on nearly every sector of the economy, including healthcare, defense, education, finance, and technology. And they last a long time. As the Chamber noted in another amicus brief recently filed before this Court, of the 2,086 cases in which the government declined to intervene between 2004 and 2013 and that ended with zero recovery, 278 of them lasted for more than three years after the government declined and 110 of those extended for more than five years after declination. *See* Chamber of Commerce Br. 13, *Gilead Scis., Inc.* v. *United States ex rel. Campie*, No. 17-936 (U.S. Feb. 1, 2018). Those years, added to the longer limitations period in subsection 3731(b)(2), means that companies may frequently litigate claims based on events that are well over a decade old.

The burdens of such litigation are not hard to see. According to a 2018 government survey, the median tenure for wage and salary workers in the private sector was only 3.8 years. *See* Bureau of Labor Statistics, U.S. Dep't of Labor, *Employee Tenure 2018*, at 2 (Sept. 20, 2018), https://www.bls.gov/news.release/pdf/tenure.pdf. Within a ten-year period, therefore, a typical employee in the private sector will likely have changed jobs twice. As a result, defendants and courts would have to "deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading

memories, disappearance of documents, or otherwise." *United States* v. *Kubrick*, 444 U.S. 111, 117 (1979). *Cf.* Rich, *Prosecutorial Indiscretion: Encouraging the Department of Justice to Rein In Out-of-Control Qui Tam Litigation Under the Civil False Claims Act*, 76 U. Cin. L. Rev. 1233, 1264-1265 (2008) ("[M]ost non-intervened suits exact a net cost on the public.").

Discovery for such cases also imposes many practical challenges. In one recent case involving a defense contract, for example, the defendant "produced over two million pages of documents" before the relator's claims were dismissed on summary judgment nine years after the relator filed the suit. *United States ex rel. McBride* v. *Halliburton Co.*, 848 F.3d 1027, 1029-1030 (D.C. Cir. 2017). Indeed, it is not surprising that "[p]harmaceutical, medical devices, and health care companies" alone "spend billions each year" dealing with False Claims Act litigation. Bentivoglio et al., *False Claims Act Investigations: Time for a New Approach?*, 3 Fin. Fraud L. Rep. 801, 801 (2011).

The Eleventh Circuit suggested that the discovery burdens occasioned by its view of subsection 3731(b)(2) is overstated because the government's knowledge may be relevant to other defenses, such as showing that the defendant did not "'knowingly'" submit false claims or that the false statements were not "material" to the government's decision to pay. Pet. App. 22a-23a n.10 (citing 31 U.S.C. § 3729(a)(1) and *Universal Health Servs., Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016)). But allowing relators to take advantage of the longer limitations period in non-intervened suits removes the threshold requirement that would have precluded any discovery on such issues in the first place. Those additional costs are undeniable.

C. The threat of discovery will predictably lead False Claims Act defendants to settle non-intervened suits, regardless of the merits of the allegations. About 10% of non-intervened suits result in recovery, whether through settlement or final judgment, whereas 90% of intervened actions lead to recovery. Pet. App. 11-12a. The difference in those rates cannot be explained solely by reference to the merits of the claims, *see id.* 12a n.6, but the correlations between the merits and the recovery rate cannot be ignored, either. If relators can lengthen their limitations periods under subsection 3731(b)(2) even when the government has not intervened, False Claims Act litigants are more likely to settle those suits for fear of financial and reputational risk, even though the suits are frequently meritless.

The cost of settlement in these circumstances can be enormous. As noted above, the number of new *qui tam* False Claims Act matters has increased significantly, from 385 filed in 2006 to 645 in 2018. *See* 2018 Fraud Statistics 1. By contrast, the number of government-initiated False Claims Act matters has remained relatively steady during this period, ranging from a low of 70 in 2006 to a high of 160 in 2008. (In 2018, there were 122.) *See id.* With the dramatic increase in *qui tam* suits, relators' recoveries have also increased dramatically. In 2006, non-intervened actions resulted in roughly $22 million in recovery; in 2018, relators recovered approximately $118 million in non-intervened suits. *See id.*

The difficulties of dealing with stale claims reach beyond financial risk, as businesses may also suffer reputational hardship from having to defend a False Claims Act suit. The "mere presence of allegations of fraud may cause [government] agencies to question the contractor's business practices." Canni, *Who's Making*

False Claims, The Qui Tam Plaintiff or the Government Contractor? A Proposal to Amend the FCA to Require that All Qui Tam Plaintiffs Possess Direct Knowledge, 37 Pub. Cont. L.J. 1, 11 (2007). The reputational damages are worse if a relator's claims from long ago survive a motion to dismiss on limitations grounds. Such reputational risk, combined with financial harm, could lead some businesses to exit the government program altogether. *See* Memo. from Michael Granston, Dir., Commercial Litig. to Commercial Litig. Branch, Fraud Sec. 5 (Jan. 10, 2018) ("[T]here may be instances where an action is both lacking in merit and raises the risk of significant economic harm that could cause a critical supplier to exit the government program or industry"), https://www.fcadefenselawblog.com/wp-content/uploads/sites/561/2018/01/Memo-for-Evaluating-Dismissal-Pursuant-to-31-U-S.pdf; Macagnone, *DOD Buying Group Pushes House Panel for Rules Reform*, Law360 (May 17, 2017), https://www.law360.com/articles/924706/dod-buying-group-pushes-house-panel-for-rules-reform.

CONCLUSION

The judgment of the Eleventh Circuit should be reversed.

Respectfully submitted.

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